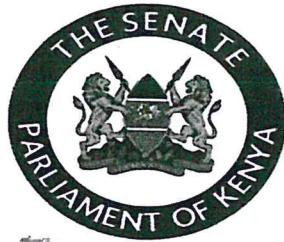


PARLIAMENT OF KENYA



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Recommended for approval
for tabling.

10/05/2022 12TH PARLIAMENT - THE SENATE

SENATE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION

A REPORT ON CONSIDERATION OF THE CONTROLLER OF BUDGET
REGULATIONS, 2021

At-Hon. Speaker
You may approve for
tabling.
10/05/22

The Senate,
Clerk's Chambers,
Parliament Buildings,
P.O. Box 41842-00100,
Nairobi.

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COMMITTEE	DELEGATED LEGISLATION
CLERK AT THE TABLE	M. ANJIBARI

May, 2022

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
PREFACE.....	iv
Establishment of the Committee	iv
Membership of the Committee	iv
The Senate Sessional Committee on Delegated Legislation is comprised of the following Senators:- ...	iv
Acknowledgement	ii
CHAPTER ONE.....	1
INTRODUCTION.....	1
1.0 BACKGROUND.....	1
1.1 LEGAL BASIS.....	1
1.2 OVERVIEW OF THE REGULATIONS.....	1
1.2.1 Objectives of the Regulations.....	1
1.2.2 Submission and Review of the National Government and county government, planning and budget documents.....	2
1.2.3 Procedure for approval of withdrawal from Public funds.....	3
1.2.4 Monitoring, Evaluation and Reporting on Budget Implementation.....	4
1.2.5 Investigations.....	5
1.2.6 Dispute Resolution and Complaint Handling.....	5
CHAPTER TWO.....	6
STAKEHOLDER ENGAGEMENT.....	6
2.0 CONSULTATION WITH STAKEHOLDERS.....	6
2.1 COMMENTS BY STAKEHOLDERS.....	7
2.1.1 The Cabinet Secretary, National Treasury and Planning.....	7
2.1.2 Submissions from the Governor, Central Bank of Kenya.....	8
2.1.3 Submissions from the Commission on Revenue Allocation.....	8
2.1.4 Submissions from the Office of the Auditor General.....	8
2.1.5 Submissions from Institute of Certified Public Accountants of Kenya (ICPAK).....	8
2.1.6 Submissions from the Intergovernmental Relations Technical Committee (IGTRC).....	10
2.1.7 Submissions from the County Assemblies Forum(CAF).....	10
2.1.8 Submissions from the Council of Governors(COG).....	11
CHAPTER THREE.....	12

COMMITTEE OBSERVATIONS	12
3.0 Committee Observations	12
CHAPTER FOUR.....	13
COMMITTEE RECOMMENDATION	13

PREFACE

Honourable Speaker,

Establishment of the Committee

The Senate Sessional Committee on Delegated Legislation is established under standing order 221 of the Senate Standing Orders. The Committee is mandated to scrutinize statutory instruments laid before the House to ensure that they are consistent with the provisions of the Statutory Instruments Act, 2013.

Membership of the Committee

The Senate Sessional Committee on Delegated Legislation is comprised of the following Senators:-

Sen. Mwinyihaji Mohammed Faki, MP- Chairperson

Sen. Agnes Kavindu Muthama MP- Vice Chairperson

Sen. Samuel Poghisio, EGH, MP

Sen. Farhiya Ali Haji, CPA, MP

Sen. Judith Pareno, MP

Sen. Mary Seneta, MP

Sen. Abshiro Halake, MP

Sen. Samson Onge'ri, MP

Sen. Anwar Loitiptip, MP

Honourable Speaker,

Executive Summary of the Report

The Controller of Budget Regulations, 2021 were published by the Controller of Budget, on 3rd December, 2021 pursuant to section 25 of the Controller of Budget Act.

The Regulations were tabled before the Senate by the Senate Deputy Majority Leader on 9th February, 2022 and subsequently committed to the Senate Sessional Committee on

Delegated Legislation. Pursuant to section 15(2) of the Statutory Instruments Act, the Committee is required to scrutinize the Regulations.

The Sessional Committee on Delegated Legislation considered the Regulations and received submissions from the National Treasury, the Central Bank of Kenya (CBK), the County Assembly Forum(CAF), the Council of Governors(COG), the Office of the Auditor General, the Intergovernmental Governmental Relations Technical Committee (IGTRC), the Commission on Revenue Allocation(CRA) and the Institute of Certified Public Accountants, Kenya(ICPAK).

Honourable Speaker,

Some of the key observations by the Committee on the Controller of Budget Regulations, 2021, were that Regulation 22(3) of the Regulations contravenes provisions of the Public Finance Management Act, 2012 and that the penalties proposed in the Regulations were not deterrent.

Honourable Speaker,

After consideration of the Controller of Budget Regulations 2021, pursuant to section 15 (1) of the Statutory Instruments Act and Standing Order 221 (4) (b), the Sessional Committee on Delegated Legislation recommends that the Senate resolves that the Controller of Budget Regulations, 2021 be annulled.

Acknowledgement

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in the conduct of the public hearings and in fulfilling its mandate. Further, the Committee wishes to thank the stakeholders who made both written and oral submissions during the consideration of the Regulations.

Honourable Speaker,

It is now my duty, pursuant to section 15 (1) of the Statutory Instruments Act and standing order 221 (4) (b) of the Senate Standing Orders, to present the Report of the Sessional Committee on Delegated Legislation on the Controller of Budget Regulations, 2021.

I thank you, Honourable Speaker.



**SEN. MWINYIHAJI MOHAMMED FAKI, MP
CHAIRPERSON,
SENATE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION
6TH MAY 2022**

**ADOPTION OF THE REPORT OF THE SESSIONAL COMMITTEE ON THE
CONTROLLER OF BUDGET REGULATIONS, 2021**

We, the undersigned Members of the Senate Sessional Committee on Delegated Legislation do hereby adopt this Report at a virtual meeting held on 6th May, 2022 at 11.00 a.m.

Sen. Mwinyihaji Mohammed Faki, MP - **Chairperson**

Sen. Agnes Kavindu Muthama MP - **Vice Chairperson**

Sen. Samuel Poghio, EGH, MP

Sen. Farhiya Ali Haji, MP

Sen. Samson Ongeru, MP

Sen. Abshiro Halake, MP

Sen. Anwar Loitip, MP

Sen. Judith Pareno, MP

Sen. Mary Seneta, MP

DATED: 6TH MAY, 2022

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND

1. The Controller of Budget is charged with a broad mandate under the Constitution of Kenya and the Controller of Budget Act, 2016. In execution of this mandate, the Controller of Budget faces the following challenges-
 - (a) Incomplete reports from national and county governments entities
 - (b) Lack of standardization of documents required for request of withdrawal of funds
 - (c) Lack of procedures for handling complaints, dispute resolution and investigations
 - (d) Delay in receiving reports affecting the mandate of the Office of the Controller of budget to meet constitutional and statutory timelines.
2. It is on the basis of the above that the Controller of Budget published the Regulations to provide for the mechanisms to manage, guide and provide a uniform, efficient and effective procedure to ensure timely approvals of withdrawals, accurate and prompt reporting.

1.1 LEGAL BASIS

3. The Regulations are made pursuant to section 25 of the Controller of Budget Act

1.2 OVERVIEW OF THE REGULATIONS

1.2.1 Objectives of the Regulations.

4. The purpose of the Controller of Budget Regulations 2021 is to set out the procedure for –

- i. Authorization of withdrawal of funds from, the consolidated fund, the equalization fund, the County Revenue fund or any other public fund.
- ii. Enforcement of budgetary ceilings on national and county government expenditure.
- iii. Monitoring, evaluating, reporting and making recommendations to the national and county governments
- iv. Preparation and submission of quarterly reports and special reports.
- v. Publishing and publicizing information on budget implementation.
- vi. Conduct of investigations as provided under Article 252(1) (a) of the Constitution.
- vii. Conciliation, mediation and negotiations as provided Under Article 252(1) (b) of the constitution.

1.2.2 Submission and Review of the National Government and county government, planning and budget documents

5. Regulations 5 and 6 provide for the procedure for submission of requests to the controller of budget by the National and County Governments. The regulations propose that the National government and the county governments submit the following documents within fourteen days of approval or publication.
 - i. Medium Term Plan
 - ii. Budget Review and Outlook Paper
 - iii. Debt Management Strategy Paper
 - iv. Budget policy Statement (national government) and County fiscal strategy paper (county government)
 - v. Approved budget estimates or votes –on-account.
 - vi. Submitted budget estimates and appropriation bill in the case of vote on account.
 - vii. The appropriation Act.
 - viii. The equalization fund appropriation Act.

- ix. Presidential warrant (national), Governors warrant (county)
- x. Annual Cashflow plan
- xi. Names of authorized signatories for national exchequer accounts and equalization fund account, their specimen signatures and relevant mandate numbers.
- xii. Annual work plans
- xiii. The Division of Revenue Act
- xiv. Approved cash disbursement schedules for county governments
- xv. The County Allocation of Revenue Act other necessary documents listed in the regulations.

1.2.3 Procedure for approval of withdrawal from Public funds

6. Regulations 7 to 16 prescribe the procedure and format of approval for withdrawal of funds from a public fund. A request to the controller of budget by the National Treasury for approval of funds from the consolidated fund shall be made in a requisition form referred as Requisition Form A (annexed to the regulations) accompanied by;-national exchequer account balances and reconciled national exchequer ledgers, a record from Central Bank of Kenya of payments awaiting funding, a statement of revenue receipts into the Consolidated Fund and up to date national exchequer account statements.
7. The regulations also provide for the required supporting documents accompanying a withdrawal request for the purpose of development, recurrent expenditure, for payment of public debt and withdrawal from other funds other than the consolidated fund. The regulations also provide for the procedure in the case of a request for withdrawal of funds on vote on account.
8. The regulations stipulate that every request for approval for withdrawal of funds from the Consolidated Fund, the National Treasury shall ensure the request

submitted to the controller of Budget meet the criteria specified in the regulation for example the request should be in line with planning and budget documents and contain with regards to vote, programme, sub programme and project.

9. For the purpose of approval of the request by the Controller of Budget the regulations prescribe an approval form referred to as Form B which will be sent to the Central Bank and a copy to the National Treasury.
10. To prevent overdrawn of public funds the regulations provide that the National Treasury and the County Treasury shall give authority to the Controller of Budget to view the exchequer account balances and the Central Bank of Kenya shall grant the controller of Budget real-time viewer rights.

1.2.4 Monitoring, Evaluation and Reporting on Budget Implementation.

11. The regulations provide that on quarterly basis the controller of budget shall monitor, evaluate, report and make recommendations to Parliament, County Assembly, the National Treasury and County Treasury on compliance and measures to ensure compliance with budgetary ceilings. They stipulate that within one year of coming into force of the regulations, the Controller of Budget shall develop a monitoring, evaluation and reporting framework for purposes of carrying out its functions.
12. Further the regulations provide for the factors to be considered by the Controller of budget when undertaking monitoring, evaluation and reporting. The factors include; whether the budget estimates comply with the program based budgeting approach, whether the budget estimates comply with fiscal responsibility principles under the PFM, the reasonableness of revenue estimates, classification and composition between recurrent and development expenditure, linkage between policy, planning

and budgeting framework, compliance with statutory timelines for submission of budget documents among others.

1.2.5 Investigations

13. The regulations provide that the controller of budget may conduct investigations on his or her own motion or upon a complaint made by a member of the public on any matter on implementation of the budgets of the national and county governments agencies. The guiding principles for conducting the investigations as provided in the regulations include;-independence, objectivity, impartiality, fairness and integrity. The possible matters to be investigated may include;-a matter that raises serious material breach as provided for under section 94 of the Public Finance Management Act, 2012, noncompliance in budget implementation or relates to falsification of documents

1.2.6 Dispute Resolution and Complaint Handling

14. The regulations provide for procedure of handling dispute resolution by the Controller of Budget. The regulations provide that the Controller of Budget may resolve any matter relating to budget implementation, brought before him or her by conciliation, mediation or negotiations.

CHAPTER TWO

STAKEHOLDER ENGAGEMENT

2.0 CONSULTATION WITH STAKEHOLDERS

15. The Sessional Committee on Delegated Legislation received written submissions and held a meeting with stakeholders on 18th March, 2022. The Committee therefore considered the written and oral submissions from the following stakeholders:

(1) The Cabinet Secretary for National Treasury ;

(2) The Governor, Central Bank of Kenya ;

(3) The Commission on Revenue Allocation;

(4) Office of the Auditor General;

(5) Institute of Certified Public Accountants of Kenya;

(6) The Intergovernmental Technical Committee;

(7) County Assemblies Forum;

(8) Council of Governors.

16. During the physical meeting held by the stakeholders on 18th March, 2022 , the Controller of Budget was present and responded to issues raised by stakeholders. Documentation presented by the Controller of Budget during the meeting is at annex 9.

2.1 COMMENTS BY STAKEHOLDERS

The following is a summary of the submissions from stakeholders on the Regulations-

2.1.1 The Cabinet Secretary, National Treasury and Planning

17. The Cabinet Secretary Submitted that-

- (a) the Regulations had not fully captured the comments of the National Treasury received before publication of the Regulations
- (b) Regulations such as regulation 5(1r) included a number of administrative matters which could be addressed when need arose and hence no need to have this in the Regulations;
- (c) Some of the provisions within the regulations such as Regulations 5(1s)(3), are already contained in other statutes and the Constitution and as such are repetitive;
- (d) Regulation 22(3) on submission of quarterly reports to the controller by the 15th day after the end of each quarter contradicts section 83(3) and (5) of the PFM Act, 2012 which requires ministries, departments and agencies (MDAs) to submit the National Treasury and a copy to the controller of budget the quarterly report on the 15th day after the end of every quarter and the National Treasury to submit a consolidated quarterly report to parliament and a copy to the Controller of Budget by 45th day after the end of each quarter. However, in this case the PFM supersedes

18. While responding to issues raised by the National Treasury, the Controller of Budget indicated that the National Treasury had been involved during the drafting of the Regulations and correspondence had been forwarded to the CS, National Treasury to comment on the Regulations before publication. However, no response had been received from the National Treasury.

2.1.2 Submissions from the Governor, Central Bank of Kenya

19. The Governor, Central Bank of Kenya made his presentation to the committee via telephone and informed the Committee that the Controller of Budget had engaged the Central Bank since June, 2021 and various proposals made by the Central Bank had been incorporated in the Published Regulations.

20. The Governor however observed that the Regulations place a heavy reliance on exchange of paper to support authorization of withdrawal of funds. This is cumbersome, inefficient and expensive for counties. The CBK proposed digitization of the process.

2.1.3 Submissions from the Commission on Revenue Allocation

21. The Chairperson, Commission on Revenue Allocation submitted that the Regulations were clear and precise, however there were a few clauses within the Regulations which could be amended to make the Regulations better. The proposals made by the CRA are attached herein as annex 3.

2.1.4 Submissions from the Office of the Auditor General

22. The OAG supported the Regulations but proposed some proposals to strengthen the Regulations, key among which was the inclusion of pending bills as an issue which the controller of budget may resolve through mediation, conciliation and negotiation. The proposals made by the IGTRC are attached herein as annex 4.

2.1.5 Submissions from Institute of Certified Public Accountants of Kenya (ICPAK)

23. The Institute applauded the Controller of Budget for coming up with the Regulations that seek to give further guidance on how to comply with the Controller of Budget Act. However the Institute was of the view that there were a few clauses within the Regulations which could be amended to make the Regulations better. Some of the proposals-

- (a) Including professional bodies in the implementation of controller of budget findings and recommendations under Regulation 25

- (b) Including a framework to safeguard members of the public who lodge complaints on budget implementation
- (c) The prescribed form on how a complaint should be submitted as provided in the schedule to the regulations should be more detailed

The proposals made by the ICPAK are attached herein as annex 5.

2.1.6 Submissions from the Intergovernmental Relations Technical Committee (IGTRC)

24. IGTRC submitted among others, that-

- (a) Under Part V of the Regulations, on complaint handling, the CoB cannot be a judge in their own cause
- (b) The Regulations should have offered partnership opportunities between the CoB and the two levels of government to develop county focused public sensitization as formulation of budgets in this manner would afford the citizenry inclusivity

The proposals made by the IGTRC are attached herein as annex 6.

2.1.7 Submissions from the County Assemblies Forum(CAF)

25. CAF submitted that-

The Regulations would address the issues being faced by county assemblies in requisitioning funds through the CEC finance at the County Government as County Assemblies had been frustrated by the County Executive through alteration of the amounts of County Assembly's requisitions before going to the Controller of Budget. The requirement of withdrawing of funds authorized by Controller of Budget in 7 days or the failure to which the County treasury will be expected to resubmit requisition will go a long way in solving the issue.

26. The standard forms provided in the schedule and the provision of requisite list of documents required in withdrawing funds from the County Treasury will reduce the time consumed seeking authorization from the Controller of Budget thus increasing the efficiency of disbursement of funds to County Assemblies.

The proposals made by the CAF are attached herein as annex 7.

2.1.8 Submissions from the Council of Governors(COG)

The Council of Governors did not appear before the Committee but submitted a written document stating that agreed that they were consulted by CoB at every stage of the regulations and they have no objection to the Regulations. The letter submitted by COG is attached herein as annex 8.

CONSULTATIONS BEFORE MAKING THE STATUTORY INSTRUMENT

27. As per sections 5 and 5A of the Statutory Instruments Act, on proof and demonstration of sufficient public consultation, the Controller of Budget, in the explanatory memorandum indicated that a number of institutions had been consulted before publication of the Regulations. Evidence of the consultations in terms of letters, signatures and matrix highlighting how the controller of budget had dealt with each comment received was attached.

CHAPTER THREE

COMMITTEE OBSERVATIONS

3.0 Committee Observations

The Committee observed that-

1. Regulation 22(3) on submission of quarterly reports to the Controller of Budget by the 15th day after the end of each quarter contradicts section 83(3) and (5) of the Public Finance Management Act, 2012 which requires ministries, departments and agencies (MDAs) to submit to the National Treasury and a copy to the controller of budget the quarterly report on the 15th day after the end of every quarter and the National Treasury to submit a consolidated quarterly report to Parliament and a copy to the Controller of Budget by 45th day after the end of each quarter. The committee noted that while the timelines in the Regulations were in tandem with section 9 of the Controller of Budget Act, section 6 of the Public Finance Management Act, 2012, states that the PFM Act shall prevail in case of inconsistency with any other legislation in a number of matters including preparation and submission of budget estimates, including the time for doing so and raising of revenue and making of expenditures, which are activities in the implementation of the budget.
2. The Regulations do not address challenges currently being experienced such as pending bills. Regulations 8(2)(c)(iii) and 10 (2)(a)(iii) provide that an up to date schedule on pending bills and payment plan be provided by the national and county government during a request for approval for withdrawal of development expenditure, to enable the Controller of Budget track the payment of pending bills. The Committee observed that this was only a tracking mechanism and would not ensure actual settlement of pending bills before incurring new expenditure.

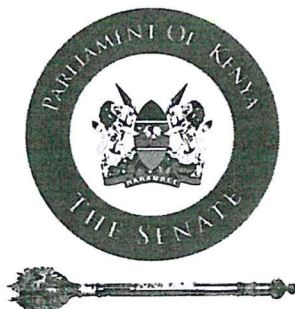
3. The penalties contained in the Regulations are not sufficient to deter non-compliance. Regulation 49 gives a blanket penalty by making reference to the Controller of Budget Act. The Committee noted that this was not sufficient deterrence, which would essentially jeopardize implementation of the Regulations.
4. The regulations are in line with Article 252(1) (a) of the Constitution which provides that an independent office holder may conduct investigations on its own initiative or on complaint made by a member of the public. However, the Committee noted that the investigative powers as contained in Part IV of the Regulations are likely to overlap with investigate powers of other government agencies such as the Ethics and Anti-Corruption Commission.

CHAPTER FOUR

COMMITTEE RECOMMENDATION

Based on the foregoing observations, and pursuant to section 15 (1) of the Statutory Instruments Act, 2013 and in accordance with standing order 221 (4) (b) of the Senate Standing Orders, the Senate Sessional Committee on Delegated Legislation recommends to the Senate that the Controller of Budget Regulations, 2021 be annulled.

ANNEXES



Please see attached in the appendix, the Controller of Budget Regulations, 2021 and submissions from:

1. **The National Treasury,**
2. **The Central Bank of Kenya (CBK),**
3. **The County Assembly Forum (CAF),**
4. **The Council of Governors (COG),**
5. **The Office of the Auditor General,**
6. **The Intergovernmental Governmental Relations Technical Committee (IGTRC),**
7. **The Commission on Revenue Allocation (CRA); and,**
8. **The Institute of Certified Public Accountants, Kenya (ICPAK).**